

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

NOS COMMUNICATIONS, INC.	)	
	)	
_____	)	CASE NO. 92-352
	)	
ALLEGED VIOLATION OF KRS 278.020	)	
AND KRS 278.160	)	

SHOW CAUSE ORDER

On May 21, 1992, NOS Communications, Inc. ("NOS") submitted an application for a Certificate of Public Convenience and Necessity to operate as a reseller of telecommunications services within the Commonwealth of Kentucky.<sup>1</sup>

In response to an Order dated July 8, 1992, NOS indicated it might have provided service in Kentucky without Commission approval. NOS's response is attached hereto and incorporated herein as Appendix A.

Accordingly, the Commission finds a prima facie case has been established that NOS failed to file its application for a certificate to provide service and its tariff with the Commission prior to collecting compensation for such utility service resulting in a violation of the provisions of KRS 278.020 and KRS 278.160.

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<sup>1</sup> Case No. 92-224, Application of NOS Communications, Inc. for a Certificate of Public Convenience and Necessity as a Reseller of Telecommunications Services Within the Commonwealth of Kentucky.

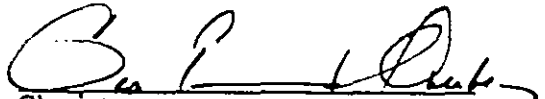
IT IS THEREFORE ORDERED that:

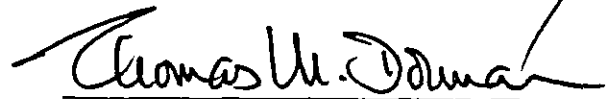
1. NOS, represented by counsel, shall appear at a hearing scheduled September 25, 1992, at 10:00 a.m., Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky, and be prepared to show why NOS should not be penalized pursuant to KRS 278.990 for failing to comply with KRS 278.020 and KRS 278.160.

2. NOS shall immediately stop charging for any and all telecommunications services within the Commonwealth of Kentucky.

Done at Frankfort, Kentucky, this 27th day of August, 1992.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 92-352 DATED 8/27/92

Item 1

1. Has NOS or any of its affiliates ever provided and/or collected any money from the public for the provision of intrastate telecommunications services in Kentucky? If so, please explain.

Response to Item 1

The following will demonstrate that NOS is not engaged in the provisioning of intrastate interexchange services within the state of Kentucky.

First, NOS is fully aware of its obligations to obtain state certification prior to offering for sale any intrastate long distance services. Because of its awareness, NOS has not marketed in the state and does not now offer, nor hold itself out as offering intrastate services in Kentucky. NOS has no offices or sale agents active in the state.

NOS' market focus is national in scope and directed to the small business user. In the marketing of its services, NOS prohibits the marketing of any intrastate services in any state in which it is not certificated if such approval is required. Hence, NOS' agents advertise and promote NOS' interstate services only except for those states such as Colorado, Michigan, Oklahoma, Virginia, etc. that do not regulate resale services or those states for which NOS has complied with applicable prior approval procedures.

It is of course possible, that small business users when contacted by a national telemarketing program will reside in a state for which NOS has not yet completed the certification or other regulatory process. When this occurs, NOS' policy is to hold

the orders of such members for service until state approval is obtained. NOS currently has a number of customers in other states for which it has not completed the approval process. These customers, like those in Kentucky, have been gained only as a result of an out of state national marketing campaign. It is NOS' policy not to activate such customers until after final approval is obtained from the state commissions.

Despite these efforts and commitments, it is possible that some intra-Kentucky calling has occurred. This calling is beyond NOS' ability to control. First, as a switchless reseller, NOS has no control over the facilities or equipment used to transport any of its customers' calls. NOS is not able therefore to block or default intrastate calling should any occur despite its pointed efforts to prevent such calling in states, like Kentucky, in which its application for certification remains pending.

Secondly, there is the difficulty in policing totally effectively the thousands of orders NOS' national telemarketing program produces each month. In addition, NOS' underlying carrier provides services to hundreds of resellers and on occasion, some customer orders for carriers not yet certified in all states may slip through the system.

Thirdly, when NOS conducts its national telemarketing campaigns, it is exercising its federal rights to market and provide NOS' interstate services for which no prior KPSC or Federal Communication Commission approvals are required. In other words, NOS is implementing its federal right to engage in advertising its interstate resale offerings while respecting fully the state obligation for prior certification as to intrastate services.

For the few customers that do slip through, NOS' policy is to treat any intrastate calls that cannot be blocked or defaulted to local carriers, as "incidental traffic." "Incidental traffic" is traffic that while not officially authorized for carriage, cannot be blocked from carriage due to technological constraints. Such traffic then "leaks" through the network much as some intraLATA traffic does in those states which have not as yet approved intraLATA competition.

In addition, "incidental traffic" is traffic that the carrier does not overtly offer for sale to the public. That is, otherwise unauthorized traffic, when carried, should not invoke the enforcement action of the Commission, so long as the carrier refrains from selling or attempting to sell its carriage of such traffic.

Other states have explained the concept of "incidental traffic" as for example --

We find that the public interest is better served by an interim decision that authorizes immediate interLATA entry. As stated above, the MFJ contemplates a competitive interLATA market. The development of such a market will take time. Authorization of entry is a necessary first step . . . . Failure to authorize entry at this time would allow an unmistakable competitive advantage to AT&T.

The complexity of the situation is compounded by the overlapping jurisdictions. Those Applicants that do operate interstate are likely to advertise their services to the public in California. However, for many potential customers their services are likely to be less attractive if intrastate interLATA calling is not authorized.

In order to protect Pacific [Bell], the interLATA authority conferred by this decision is conditioned on Applicants' willingness to refrain from holding out intraLATA service.

Applicants themselves have indicated a willingness to take certain precautions in their advertising and customer contacts to prevent the possibility of using their authority to make intraLATA calls, diminishing the risk of an adverse impact on Pacific. We are satisfied that these measures will adequately protect Pacific's interests . . .

We acknowledge that "holding out" is difficult to define in all possible permutations. We are most concerned about advertising and customer contacts . . .

We also recognize that some intraLATA calls will be completed over Applicants' networks, regardless of their good faith in not holding out such service. Such intraLATA calls are incidental to Applicants' intrastate interLATA authority . . . (CPUC D. 84-01-037, 1984).

The logic and reasonableness of this approach in handling the difficult issues raised by the need to support the rapid development of competition and the benefits it brings to the public, while at the same time protecting traditional policy values is, in NOS' view, a most judicious and economically sound policy.

By NOS' treating any Kentucky interLATA traffic as incidental, NOS is in full compliance with such a regulatory policy. Moreover, such a policy is necessary to achieve the constitutionally required balancing of federal and state rights. If a state's prior certification requirements were construed or applied to block the right to advertise and sell interstate services, a conflict would arise because of the interference with NOS' federal rights created by an overly broad application of state certification requirements.

There is also a jurisdictional basis for the position of NOS. By not holding itself out to the public to provide intrastate interLATA or intraLATA services, NOS, in regard to the exercise of state jurisdiction is not acting like a common carrier or "public

utility," subject to the KPSC's jurisdiction. In fact, NOS sales agents are specifically instructed to inform customers responding to its interstate sales efforts, that NOS is not as yet certified by the KPSC, cannot therefore offer intrastate interLATA services and will not be able to until certification is granted.

Customers are further informed that should they have an intrastate calling requirement, until certified, NOS must handle that traffic as "incidental traffic."

The steps followed by NOS have been specifically designed to balance NOS' federal rights with its Kentucky obligations. Moreover, it is submitted that these steps are fully consistent with both practical business realities and state policies which, in the interest of encouraging the economic benefits for the state that competition can provide, avoids placing too fine a point on the sweep of jurisdictional assertion. And finally, it should be noted that the states of Alabama and Florida, in which similar questions were recently posed, have accepted the foregoing response as meeting their respective regulatory concerns.

END OF RESPONSE TO ITEM 1